

February 23. 1769.

A N S W E R S
F O R

John Craich merchant in Aberlemno, and James
Mitchell merchant in Montrose,



T O

The PETITION of Robert Stephen and others,
trustees for the creditors of Alexander Arbuth-
not.

ALEXANDER ARBUTHNOT merchant in Montrose
having of late become extremely backward and re-
mifs in his payments, fundry of his creditors took
the alarm; and fuch of them as had *parata executio*
upon their refpective grounds of debt, proceeded to operate
their payment by legal diligence.

Amongft thefe, the respondent James Mitchell, as indorfee
by the other respondent John Craich to the faid Alexander
Arbuthnot's accepted bill of L. 50 Sterling, dated 29th July
1766, payable one month after date, did, upon the 11th
December 1766, being five months after the bill ought to
have been paid, concur with Mefrs. Fords and Webfter, who
had the like diligence upon their grounds of debt, in execu-
ting a poinding of a parcel of timber then ftanding in Mr
A Arbuthnot's

Arbuthnot's timber-yard, a large open area, inclosed in the manner to be in the sequel more particularly stated; and it stands in proof, by the concurring testimonies of William Strachan and John Ferrier, that they were so far from intending that undue advantage which creditors for the most part take in executions of poinding, of having the goods appraised so much below their real value, that they specially recommended it to the messenger and appraisers, to be cautious in this particular; and that the timber should be appraised rather above than below its real value; which therefore is real evidence, that they had nothing in view but fairly and honestly to operate payment of their just debts.

Upon the 21st January 1767, which was about six weeks after the aforesaid poinding, Alexander Arbuthnot execute a trust-disposition of his whole means and effects, heritable and moveable, in favour of the petitioners, for themselves, and as trustees for his other creditors; and upon this title these trustees brought an action in this court, against the respondents, and the other creditors at whose instance the aforesaid poinding had been executed, and against the messenger and notary, concluding to have it found and declared, that the aforesaid poinding was void and null, upon the grounds therein specially set forth; particularly, That the timber being at the time standing in a timber-yard or inclosure, the gate, which was the usual entry into said yard, under lock and key, and actually locked at the time, so that no access could be had thereby; but that there being another gate in the south-west side of said timber-yard, for taking in the timber from the river, barricadoed on the inside; the messenger, notary, and their assistants, had taken upon them violently to force that barricade, by removing from the flaik or stile placed across said western gate or entry three trees, the one end of which was fastened in the ground, and the upper end resting upon the upper bar of the flaik; that this forcible entry had been made without authority of letters of open doors; so that, *supra tota materia*, they

they were guilty of a spuilzie, and ought to repeat to them, the trustees, the value of the timber so poinded, with damages and expences.

The respondents justified this poinding, as proper and legal, upon the *species facti* by them stated, respecting the state and condition in which they found the aforesaid gate, and the manner in which they got access thereby to the timber-yard, without force or violence of any kind, which would have required the extraordinary remedy of letters of open doors.

The Lord Barjarg Ordinary pronounced an act in common form, to be reported to his Lordship, allowing to both parties a proof before answer, of their several allegations; and upon advising the same, was pleased, of this date, to pronounce the following interlocutor. Feb. 23. 1768

“ proof adduced for both parties, and former steps of process, finds, That the defenders had entered into the timber-yard in a clandestine and irregular manner, by forcing open a back-gate that was barricadoed, and not in use to be made the entry to the said yard, upon any other occasion than carrying in wood from the sea, without asking or attempting to get access at the common and ordinary entries to the said yard, and carried on their poinding there; and therefore finds the said poinding illegal, and reduces the same, and executions thereof, and decerns; and ordains the pursuers to give in an account of the damages sustained by them in consequence of the said poinding.” And to which he adhered by two other interlocutors, 2d and 11th August 1768.

Against which interlocutors the now respondents having preferred a reclaiming petition, your Lordships, upon advising the same, with the answers, appointed memorials upon the abstract point of law, Whether, in this case, letters of open doors were requisite to intitle the messenger to enter the aforesaid yard to execute the poinding? and upon advising these, your Lordships pronounced an interlocutor, 26th January last,

last, now brought under review by this reclaiming petition, sustaining the defence, and assolzieing.

In reclaiming against this interlocutor, the petitioners have bestowed a deal of argument, to prove a proposition which never was disputed, *viz.* That officers of the law, transgressing the duty of their offices, in doing what the law did not authorise, are guilty of an offence for which they and their employers are answerable, illustrated in various examples, to every one of which the respondents are ready to subscribe. But it is begging the question, to say, that the case in hand falls under that predicament. Your Lordships have judged otherwise; and as the case in all other respects stands precisely where it did, the respondents persuade themselves, that upon reconsidering the same, your Lordships will see no cause to vary the former judgements.

And, in the entry, the respondents will be allowed to observe, that as the law has devised this form of diligence, for attaching the moveable effects of a debtor, for payment of his just and lawful debts, and has even put the creditor under a restraint of attaching the real estate, if moveables can be discovered, it may justly be considered as the favourite diligence of the law, and ought not to be put under any unnecessary restraint, to render the execution of the same more tedious, difficult, or expensive, than is absolutely necessary; and as your Lordships have in this case justified the poinding, should you now see cause to alter that interlocutor, the respondents and the messenger employed by them, could not justly be found fault with, if they entertained the same opinion in point of law.

The petitioners are pleased to inform your Lordships, that the other creditors who were conjoined in the same poinding, have deserted therefrom; from which they would infer an acknowledgement on the part of these other creditors, that the poinding had been improper and illegal. What truth may be in this fact, the respondents have no access to know,
nor

nor is it in any degree material; but according to the information which they received, it was a compromise, not an absolute surrender, which these other creditors were prevailed upon to make, rather than engage in a law-suit with these trustees, who are combating, not with their own money, but with that of the creditors who acceded to the trust.

The plea of favour is likewise much insisted upon, That as the scope of this action is only to deprive the respondents of that preference which they had gained by the priority of their diligence, and to bring the goods pointed into the aggregate fund, under the management and direction of these trustees, to be applied indiscriminately for payment of the whole creditors equally and proportionally, *rapienda est occasio* to deprive the respondents of the advantage they had gained by the priority of their diligence: which is, in other words, to arraign the justice of the law, which not only authorises, but favours the diligence of just and lawful creditors, in operating payment of their debts: *Vigilantibus jura subveniunt*; and if the respondents are rightly informed, sundry of the debts due by the bankrupt, that are now attempted to be brought in for a share of this pointing, were contracted of dates posterior to the bill upon which the respondents diligence proceeded.

The petitioners divide their argument into two points: 1st, In point of fact, Whether the entry to this yard taken by the respondents, or the officers employed by them, was in the proper and ordinary way? or if it was forcible and irregular? 2^{dly}, In point of law, Whether the respondents were sufficiently authorised to enter the yard in the way they did? or if they ought to have previously obtained letters of open doors, or other special warrant, for that effect? And though these two points run so much into one other, that they cannot well be separated, the respondents will endeavour to follow the petitioners in the road they lead.

And, with respect to the first of these, the witnesses on

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both

both sides do not materially differ in the description which is given of the form and manner in which this area or open yard is inclosed, mostly by a peeling or spars of timber; some of the witnesses say, between six and seven feet high; others, between seven and eight: That on the north side of this yard there is a large gate, and a small door or wicket on the south side: That there is another gate or opening on the west end, by which the messenger and apprisers entered when they went to execute the poinding.

Most of the witnesses seem to say, that the principal use of this last-mentioned entry was, to take in the timber from the river: and the respondents have no reason to doubt, that this truly was the fact; though they are at a loss to conceive of what consequence it should be in the present question. A house may have many doors, a yard or other inclosure may have many gates, some of them more frequently used than others; and if any one of these is found to be open, whereby the officers of the law may get access without using any extraordinary force or violence, it would render this most useful and necessary diligence of the law extremely uncertain and dangerous, were the legality of the poinding to depend upon such critical niceties, whether the one gate or the other was for common use.

The description that is given of the flaik placed across the aforesaid entry, to stop up the gap, and the way and manner how that flaik was supported, merits particular attention. Peter Chapman, p. 16. very properly assimilates it to a sheep or nolt flaik; and all the witnesses agree, that it had neither locks nor bands, nor anywise fastened, but placed in the opening, and supported on the inside by two or three loose trees laid to the back of this flaik, the greater end of the trees resting upon the ground, and the smaller or upper end resting upon the upper rail of the flaik. And there will be occasion in the sequel to observe, that when the messenger and apprisers came to enter by that gate to execute the poinding,

ing, there was so little occasion for violence of any kind, that by a touch of the hand, or of a small walking cane, the upper end of these trees resting upon the flaik were removed.

To this purpose William Strachan, p. 11. C, being interrogate, How he got access into said yard? depones, " That it was by a gate or stile upon the south-west side of the yard, *which was supported in the inside by three small single trees, about 14 foot long, one end of them resting upon a rising ground in the inside, and the other end lying upon the upper side of the cross bar of the gate; of which there were three, and the trees rested upon the top of the uppermost.* Depones, That the trees were put to a side by Charles Thomson's staff; and when the trees were put aside, the gate fell backwards into the yard. And depones, That the end of the trees formerly mentioned, were not fixed in the ground at the time of their entering the yard."

John Ferrier, p. 12. I, gives the same account of the matter, viz. " That William Baillie did, with Charles Thomson's staff, push aside three trees which was supporting a gate on the side next the river, which trees were resting *with the one end upon the upper side of the uppermost bar of the gate, and the other end of them set against a rising ground in the inside of the gate; that the smallest end of the trees were uppermost; and that after the trees were so pushed aside, he saw Charles Thomson put his hand to the gate and push it over.*"

Peter Chapman, p. 15. D, depones, That upon their arrival at said yard, they went to the south-west side thereof, and found a gate or flaik which was then shut, and fastened on the inside with two trees, as he thinks: *one end of the said two trees was resting upon the back of the gate, and the other end upon the ground.*" And after giving account of their pushing aside said trees, depones, " That afterwards he saw Charles Thomson give the gate or flaik a push with his hand, upon which it fell back into the yard." And James Cloudefly,

Cloudesly, p. 16. F. depones, "That he saw either Charles
 " Thomson or William Baillie, with a staff push off three or
 " four trees that were supporting the gate on the inside:
 " That upon the trees being so pushed aside, the gate fell in-
 " to the yard: That the trees were not fastened in the ground
 " with the lower ends of them, nor any wise fastened to the
 " gate with the upper end: That it did not require any
 " strength or violence to push aside the trees, so far as he re-
 " members."

From this description of the aforefaid flaik or gate, by the
 concurring testimonies of these witnesses, it appears how
 improperly this flaik or gate, supported by two or three
 loose trees laid to on the inside, the small or upper end
 of the trees resting upon the upper bar of the flaik, can,
 with any justice or propriety, be characterised such a bar-
 ricade as should require the King's keys, or letters of open
 doors, to give access to the officers of the law, when about
 to execute the poinding.

But there is one other circumstance respecting the inclo-
 sure of this timber-yard, which the petitioners are pleased
 totally to overlook, and upon which the respondents will, in
 the sequel, take the liberty to lay some stress, if there shall
 be occasion for it. What they intend is, an opening in the
 rail itself, upon the same side with the aforefaid entry, by
 which the servants and other labourers working in said
 yard were in use to pass and repass, and by which every
 person meaning to enter the yard might have free access,
 without force or violence of any kind; and as, supposing the
 messenger and apprifers to have entered by that opening, their
 execution of poinding would have been liable to no chal-
 lenge, it will be pushing matters extremely far, if the entry
 by the gate shall be deemed an illegal and forcible entry, and
 as such vitiate the poinding, when, had they entered by the
 flap or opening in the rail itself, the poinding would have
 been liable to no such objection.

To

To this purpose William Strachan, p. 11. G, depones, That at the time of the pointing there was a hole or opening in one part of the south-west dike, at which a person might go in by stooping; thinks the opening was between three and four feet high, and about two feet and a half broad.

John Ferrier, p. 13. F, gives the same account of the breach or opening; and depones, That he has himself gone into the yard by that breach, and has seen others do so likewise, before the pointing.

Robert Brand, p. 17. D, depones, " That he the deponent has several times gone into the said yard by an opening or breach in the pailing on the south-west side of the yard."

Alexander Wright mason in Montrose, after giving account of his being employed, with some others, by Alexander Arbuthnot in his timber-yard about the Martinmas, depones, " That at the time of his working there, he observed a hole or breach in the south-west side of said yard, at which he, and some others of the masons, sometimes entered when they had not the key. And depones, That he told some other of the masons that were working with him in the said yard, that when they could not get the key to get access by the gate, they might go in at the aforesaid hole through the wall."

James Wright junior mason in Montrose, p. 18. D, concurs in all points with the witness last above mentioned; and adds, that he wrought in said yard down to the month of April last.

And John Stephen, p. 18. D, who was likewise employed at work in said yard, depones, " That they had ordinarily access to their work to the said yard by a gate on the north side thereof; but that sometimes, when the key was wanting, both the deponent, and some of his fellow-workmen, used to go in at a hole on the south-west side of the

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C " dike,

“ dike, through which he entered easily enough sidewise,
 “ stepping over the lowermost cross rance of the dike.”

From the concurring testimonies of these witnesses, it appears, that this opening in the rail was not momentary or transient, but was in that state long before this poinding, and continued so long thereafter; and that not only the tradesmen had free access to pass or repass thereby, when going to or coming from their work, but that other persons used it in the same manner, and were never challenged or found fault with.

Upon this *species facti* the question arises, Whether, in order to intitle the messenger to enter the aforesaid timber-yard to execute the poinding, it was necessary to stop the diligence of the law till letters for making open doors could be obtained from your Lordships? That these letters, if asked, would have been granted, is undoubted; because inquiry is never made whether they are absolutely necessary or not. It is sufficient if the messenger return an execution, certifying, that he could not get access to poind, by reason of locked-fast doors; and without further inquiry whether the fact is true or not, the bill is passed of course. But it is believed no instance ever occurred, where letters of open doors was applied for, in a case such as this, where there was properly no door whatever, far less a locked and steeked fast door, but a loose flaik placed across the opening, supported by two or three loose trees, nowise fixed to the flaik, but lying or resting upon the upper bar thereof.

And this leads the respondents to submit to your Lordships this simple question, What there was, in the nature of things, to have barred the messenger from poinding these very trees? How far fixed work, though removable, such as the machinery belonging to a coal-work, and others of the like nature, may lawfully be poinded, has been doubted; though the respondent will be pardoned to say, they do not perceive where the ground of doubt should be; but that these

loose

loose trees might lawfully have been poinded, is undeniable. These trees made the barricade, such as it was; the removing of them with the end of a staff gave access to the yard; and if so be that these trees might have been poinded which gave access to the yard, it would be very extraordinary, if they must have continued to protect the timber within the yard from being poinded.

The general principle of law is, That a creditor may poind his debtor's effects where-ever he can find them; and as the letters of diligence authorised the poinding, without any restriction, it is incumbent upon the petitioner to point out the law that restrains the execution of legal diligence by poinding, in cases such as this.

A distinction between personal and real diligence is to be found in the letters themselves. The letters of caption bear an express authority and command to "search for, take, and apprehend the person against whom the diligence is issued; and for that effect, if need be, to make steeked and locked-fast houses and doors open and patent."

And therefore, supposing that, instead of a poinding, it had been a caption which the messenger was here to execute, that he had seen Mr Arbuthnot standing in the yard, and had made his way to him in the same manner as he is proved to have done in executing this poinding; is it possible seriously to maintain, that his entry into the yard could have been construed as done by force and violence, under the authority and command contained in the letters of caption, of making locked and steeked-fast houses and doors open and patent, and to use the King's keys for so doing?

The letters of horning and poinding give authority "to fence, arrest, apprise, poind, and distrinzie the readiest goods, corns, cattle, &c. and others whatsoever, pertaining and belonging to the debtor, where-ever, or in whose hands the same may or can be apprehended."

And, agreeably to this, Lord Bankton, treating of personal execution,

execution, *lib. 4. tit. 37. § 21.* lays down the rule in these words: "A messenger, pursuant to the express tenor of letters of caption, may, in virtue thereof, break open the door of any house where the party is concealed, and apprehend him. But such liberty is not allowed as to pointing or distraining one's goods: *for the messenger cannot upon such letters break open a man's door, and point the goods in the house.*" And in book 4. *tit. 41. § 8.* treating of execution relating to moveables: "If the goods are *within close doors*, and the messenger cannot get access, upon returning such execution, new letters will be granted for making patent or open doors; and thereon the messenger may cause break open the doors forcibly, and point the goods therein." And he concludes with these remarkable words: "But if he get entrance, he may break open chests, cabinets, or chambers, in order to distrain the goods therein."

If these principles are just, and which the petitioners have not controverted, they confirm what the respondents have presumed to suggest as their apprehension of this matter, viz. That this restriction in executing real diligence was never intended to go further than to give some sort of privilege or protection to the domicil of the debtor. Chambers, chests, and cabinets, within a house, are locked-fast places; which, upon the plan of the petitioners argument, should *a fortiori* require letters of open doors, than an area or open timber-yard; and yet it is here laid down for certain law, not hitherto disputed, that though the messenger cannot possibly enter the house without letters for making open doors; yet having once got access to the house, he may break open chambers, cabinets, or chests, without the aid of such letters.

The style of the letters of open doors states this matter in a very clear light. They proceed upon a recital of all the previous steps of diligence; and, more particularly, "That
" he

“ he caused the messenger pass upon such a day *to the dwell-*
 “ *ing-house of* to have poinded and distrained his
 “ readiest moveable goods and gear; but could not have ac-
 “ cess thereto, by reason of the locked and steeked-fast doors;”
 referring to the execution of the messenger, certifying such to
 have been the fact. Then follows the will of the letters,
 “ charging and commanding to poind, distrinzie, &c. the
 “ readiest goods, &c. pertaining and belonging to the per-
 “ son, where-ever the same may or can be apprehended; and,
 “ if need beis, that they make steeked and locked-fast houses,
 “ gates, and doors, open and patent, and use our keys there-
 “ to.”

The petitioners are pleased to think, that though these let-
 ters of open doors are never granted but upon executions re-
 turned by the messengers, certifying their being obstructed
 in the execution of the poinding by locked and steeked-fast
 doors, the same ought not to be so strictly interpreted, as to
 exclude other cases where there may be equal reason to apply
 for the aid of the law.

But as the uniform style both of the messenger's execution,
 and of the letters themselves, are confined to that single case
 where the obstruction to the poinding proceeds from locked and
 steeked-fast doors, the respondents must be of opinion, that
 the remedy by letters passing under the King's signet, autho-
 rising the breaking open locked-fast doors, was meant to be
 confined to that special case, of which there cannot be a
 stronger proof, than that no one instance can be produced,
 where the aid of the law in this particular was demanded and
 granted, but in the case of locked and steeked-fast doors.

Other remedies may be competent, where the execution of
 the diligence of the law is otherwise obstructed; but the re-
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 ing open locked and steeked-fast places; and as no instance

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can

can be produced where these letters of open doors were demanded or granted, in any case but where the pointing was interrupted by locked and steeked-fast doors; there cannot be a stronger proof that they were devised for that single purpose.

Supposing the messenger in this case to have returned an execution, certifying the fact as it truly was, viz. That the entry to the timber-yard had two or three loose trees propping the flaik which closed the entry; and therefore praying your Lordships to grant warrant for issuing letters of open doors, to the end that with the touch of a hand, or of a staff, the heads of these loose trees might be put aside, it is not improbable that they would have been granted if asked, because such bills pass without notice: but supposing this to have been adverted to, what for a strange appearance must it have had, to demand the King's keys to lay aside the head of a loose tree, which required neither force nor violence of any kind?

Messengers would be under a strange dilemma in executing this most useful diligence, if left without any rule to direct them in what cases they might or might not proceed to point without letters of open doors. They have a plain rule to walk by when limited to locked and steeked-fast doors; but if that is not the rule, they are left to grope in the dark; and both they, and the creditor who employs them, must run the risk of after questions; such as this, Whether the obstruction they meet with in getting access to the goods pointed, though without force and violence, did require their applying for letters of open doors; and that in respect of their neglect of applying for the same, they should be liable in restitution and damages?

From the search that has been made into the signet-records a few instances are excerpted, wherein letters of open doors appear to have been issued where the goods meant to be pointed were not within the dwelling-house of the debtor, but in shops, cellars, &c.

But

But in every one of these cases the messenger's execution does certify, that he was obstructed in the poinding by locked and steeked fast doors: But as the respondents have had occasion already to observe, that these letters are granted when asked, without any ceremony, *et causa incognita*, all that can from thence be justly inferred is, that some messengers, more timorous than others, have taken the aid of the King's keys when they had no occasion for them. But be that as it will, and holding it for law, that a forcible entry cannot be made into shops, cellars, or other such places, without letters of open doors, it would be carrying the matter extremely far, to require these letters in such a case as this, where the entry to the yard was no otherwise obstructed, but by a loose flaik placed across, with two or three small trees, having the small or upper end resting upon the upper bar of the flaik, which cannot be more properly represented than as described by one of the witnesses, like a nolt or sheep flaik.

To give it some sort of appearance of a forcible entry, the petitioners are pleased to say, That as the trees which supported the flaik were laid to from the inside, no person from without could have replaced them: A proposition which the respondents will take the liberty to deny both in fact and in law. They aver it to be true, and appeal to every man's experience who has ever had occasion to pass through gates such as this, that nothing is more easy, than, before coming out, to rest the top of the trees upon the upper part of the rail, and thereafter to bring back the top of the flaik, with the trees leaning thereon.

The petitioners say further, That the poinding must have been illegal, in respect that as this was not the common entry to the timber-yard, the messenger, or any other person, might lawfully have been resisted in attempting to enter that way.

But this is plainly a *petitio principii*, as supposing that the messenger

messenger was not intitled to have entered by that way, without letters of open doors. And as for third parties, it is a clear case, that as they have no title to enter any man's house, corn, or timber yard, or any other place belonging to him, without his licence or commission, they may lawfully be resisted in every such attempt.

It might, with equal reason, be contended, that supposing the entry to a yard, park, or other inclosure, to be secured with drawing bolts running into the wall, which requires some degree of force or strength to move them backwards or forwards, the messenger should not dare to draw back these bolts, without letters of open doors; or supposing a stile, for access to the barn-yard, to prevent the trouble of always opening or shutting the gate, or, which is more similar to the case, that supposing a number of cattle pasturing in a large park, having six or more gates, or entries, one of them more frequently used than the rest, because more at hand, and therefore kept under lock and key, the other gates having nothing but loose flaiks, with a loose stone placed at the foot, as a prop or support, or a loose tree or two, the upper end resting upon the bar of the flaik; or a fold full of sheep, having a flaik such as this flaik is described to have been, placed across the entry, with a tree or two to support it; the respondents are almost ashamed to ask the question, Whether, in all or any of these cases, it would be either proper, necessary, or becoming, to apply for the King's letters?

The respondents will conclude with one other example, similar to the case in hand, with respect to the breach or open in the rail or fence of this timber-yard.

The case they allude to is of a park having cattle or corns standing in it, the gate, which is the usual entry, locked, but some yards of the dike tumbled down, whereby a large gap or opening had been made, and which had been allowed to remain in that situation for months together; and the question

stion they ask, Whether, in such case, the messenger about to poind the corns or cattle in said park, would be guilty of a spuilzie, if he did not apply for letters of open doors, to authorise his removing a tree laid across said open, to prevent the cattle breaking out? Or supposing the one gavel of a house to be pulled down, which the messenger finding in that condition when he comes to poind, finding the common door shut, he enters the house by this open in the gavel; is it possible to say, that this was a forcible or illegal entry, which required letters of open doors, because it was not the entry commonly used? This would be a hard construction indeed, and such as, it is believed, your Lordships will not readily listen to.

For as to the law of England, which the petitioners call in to their aid, as it is not by the law of that country that this question is to be judged, but by the law of Scotland, the respondents will be forgiven not to enter into an argument upon the law of another country, which they do not understand.

In respect whereof, &c.

ALEX. LOCKHART.



